



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 292 OF 2016**

**ISAAC ALUOCH POLO ALUOCHIER .....PETITIONER**

**VERSUS**

**STEPHEN KALONZO MUSYOKA & 216 OTHERS.....RESPONDENTS**

**AND**

**THE NATIONAL ASSEMBLY (INTERESTED PARTY)**

**JUDGMENT**

**INTRODUCTION**

1. The Petitioner has by a Petition dated 6<sup>th</sup> July 2016 and filed on 8<sup>th</sup> July 2016 sued 217 members of 10<sup>th</sup> Parliament of Kenya (2008 – 2013) some whom were also cabinet ministers at the time and the National Assembly as an Interested Party in a suit for remedies relating to alleged breach of constitutional provisions on the contemporaneously holding of state office and offices in a political party and alleged failure to discipline the errant persons. As some of the persons who served in the cabinet and 10<sup>th</sup> Parliament are also members of the 11<sup>th</sup> Parliament and the current executive, further orders are sought to affect their present incumbency.

**THE PETITION**

2. The background of the Petition on fact and law is set out in paragraphs 1-5 of the Petition as follows:

*1. From the Promulgation of the Constitution on 27 August 2010 to the end of the term of the 10<sup>th</sup> Parliament on 14<sup>th</sup> January 2013, Respondents Nos. 1 to 80 inclusive, most of them for the entire period, and some of them for significant portions of the entire period, contravened Article 77(2) of the Constitution by contemporaneously holding office in a political party while being an appointed state officer. By contravening Article 77(2) of the Constitution they also contravened Article 75 (1), by not avoiding conflict between their personal interest of holding the political party offices they held, and their public and official duty of respecting, upholding and defending the Constitution, as required by Article 3 (1) of the Constitution. IN the process of so contravening Articles 77(2) and 75(1) of the Constitution, they also contravened sections 10 and 12(1) of the Public Officer Ethics Act, 2003 (POEA 2003), respectively requiring public officers to abide by the*

rule of law and requiring public officers to avoid conflicts between their personal interests and their official duties.

2. Article 75 (2) of the Constitution requires that a person who contravenes Article 75(1) or 77( of the Constitution be subjected to the applicable disciplinary procedure for the relevant office and notes that the person may, in accordance with the said disciplinary procedure, be dismissed or otherwise removed from office. Pursuant to the enforcement provisions in Part V of the POEA 2003, in section 35, to 39 inclusive, section 39 of the POEA 2003 misapplies these enforcement provisions save for section 35, in cases where the Constitution provides a procedure for removal from office for misbehaviour. The Constitution then applicable, the former Constitution, provided for the removal of the vice-president, the Prime Minister, Deputy Prime Ministers, Cabinet Ministers and Assistant Ministers, doing so in sections 15(6) 15A93) and 19(2) respectively. Essentially, the occupants of offices of Vice-President, Cabinet Minister and assistant Minister could be removed from office upon the direction of the President. And with respect to the offices of Prime Minister and Deputy Prime Ministers, pursuant to section 15A (3) of the former Constitution, the applicable law governing their removal from office was section 4(4) (b) of the National Accord and Reconciliation Act, 2008 (NARA 2008), which essentially required that the National Assembly pass a resolution supported by a majority of the voting members of the National Assembly declaring no confidence in the holder of any of those three offices.

3. With respect to the offices of the Vice- President, Cabinet Ministers and assistant Ministers, the then President Mwai Kibaki, did not abide by the disciplinary requirement in Article 75(2) of the Constitution, requiring him to so discipline such office holders who had contravened Articles 75(1) and 77 (2) of the Constitution. For the only discipline he had available to him constitutionally between 27 August 2010 and 27August 2012, when the Leadership and Integrity Act 2012 (LIA 2012) was enacted, was to remove the errant office holders from the offices they occupied, pursuant to section 15(6), 16(3) and 19 (2) of the former Constitution, subject to section 4(5) of the NARA 2008, pursuant to section 15A(3) of the former Constitution, which required the consultation and written consent of he leaders of Parliamentary parties in appropriate circumstances. By so failing to remove from office the errant Vice- President, Cabinet Ministers and assistant Ministers, then President contravened Article 75(2) of the Constitution.

4. With respect to the offices of Prime Minister and Deputy Prime Ministers, it was for the members of the National Assembly to pass a resolution declaring no confidence in he errant office bearers. As it was open to each voting member of the National Assembly to so move such a motion, and none of the said members so moved such a motion, yet it was, pursuant to Article 75(2) of the Constitution the constitutional obligation upon each and all members of the National Assembly to so discipline the errant office holders, each voting member of the National assembly thereby contravened Article 75(2) of the Constitution on account of failing to discipline errant Prime Minister and the errant two Deputy Prime Ministers.

5. With respect to errant Nominated members of the National Assembly, their disciplinary procedures pursuant to Article 75 (2) of the Constitution, involved being subject to the disciplinary jurisdiction of the Justice and Legal Affairs Committee of the National Assembly pursuant to section 3(1) and (2) of the POEA 2003 and Paragraph H of the Second Schedule of Standing Orders of the National Assembly adopted on December 10, 2008, pursuant to Standing Order 198(2). The Justice and Legal Affairs Committee of the National Assembly failed to appropriately discipline the errant Nominated members of the National Assembly, pursuant to section 35 to 39 of the POEA and by so failing contravened Article 75(2) of the Constitution!"

### **RELIEFS SOUGHT**

3. Against that background, and on the contention that in so holding offices in political parties and state office the respondent committed several criminal offences, the petitioner prays that this Honourable Court makes orders as follows:

1. Finds that respondent Nos. 1 to 80 inclusive contravened Articles 77(2) and 75(1) of the Constitution, and by so doing contravened paragraph 6 of the Code of Conduct and Ethics for Members of the National Assembly published as Legal Notice No 130 of 2003.
2. Finds that, pursuant to paragraph 20 of the Code of Conduct and Ethics for Members of the National Assembly, the errant members, Respondent Nos. 1 to 80 inclusive, were required to be disciplined pursuant to Article 75(2) of the Constitution. For errant members in the Executive, excluding the Prime Minister, and in office between 27 August 2010 and 27 August 2012, their discipline involved the President directing their removal from the Executive. For the errant Prime Minister, in office between 27 August 2010 and 27 August 2012, his discipline involved the National Assembly passing by a majority vote a resolution declaring no confidence in him. For an errant members appointed to the Executive after 27 August 2012, Respondent No 30, their discipline involved the President using any of the disciplines available under the Leadership and Integrity Act, 2012, enacted on 27 August 2012. For nominated members of the National Assembly, Respondent Nos. 70 to 75 inclusive, their discipline involved the Justice and Legal Affairs Committee of the National Assembly applying the investigatory, finding, publication and reporting provisions of sections 35 to 38 of the Public Officer Ethics Act, 2003.
3. Finds that, pursuant to the self-propelling or automatic provisions of Article 2(4) of the Constitution, in the event that the constitutionally required discipline by the disciplinary organs was not effected, as it wasn't the errant members, respondent Nos. 1 to 29, 31 to 69 and 76 to 80 inclusive, were in law "otherwise removed from office".
4. Finds that, pursuant to Article 75(3) of the Constitution, the errant members, Respondent Nos 1 to 29, 31 to 69 and 76 to 80 inclusive, are disqualified from holding any State office. Consequently, any occupation of a state office by any of these errant members should cease with immediate effect, to facilitate compliance with the Constitution.
5. Finds that Respondent Nos. 81 to 217 inclusive contravened Article 75(2) by failing to discipline their errant colleagues, Respondent Nos 2 to 4 inclusive, and especially respondent No. 2, the former Prime Minister, in failing to pass a resolution by a majority vote of no confidence in the said respondents.
6. Finds that respondent Nos 30, 70 to 75 and 81 to 217 are each disqualified from being elected as a members of Parliament pursuant to Article 99(2)(h) of the Constitution, but subject to Article 99(3) of the Constitution.
7. Finds that those of respondent Nos 1 to 29, 31 to 69 and 76 to 80 inclusive, who are members of the 11<sup>th</sup> parliament are no longer members of the 11<sup>th</sup> parliament, pursuant to Article 103(1)(c). These are respondent Nos 6, 8, 13, 18, 19, 20, 21, 22, 23, 26, 27, 33, 34, 35, 37, 40, 42, 43, 46, 49, 50, 54, 55, 57, 60, 66, 67 and 79.
8. Declares that the speakers of parliament, pursuant to article 101 of the Constitution, should issue to the Independent Electoral and Boundaries Commission and affected political parties as appropriate, the notices of vacancies in the parliamentary seats occupied by respondent Nos 6, 8, 13, 18, 19, 20, 21, 22, 23, 26, 27, 33, 34, 35, 37, 40, 42, 43, 46, 49, 50, 54, 55, 57, 60, 66, 67 and 79.
9. Declares that, the President should, pursuant to article 75(3) of the Constitution, dismiss from office Respondent Nos 56 and 68, pursuant to Article 152(5)(b) of the Constitution Declares that, in the event that the President does not dismiss the said respondents, the National Assembly should, pursuant to Article 75(3) of the Constitution, commence the process of removing from office, pursuant to Article 152 of the Constitution, Respondent Nos 56 and 68.
10. Declares that the National Assembly should, pursuant to Article 75(3) of the Constitution, commence the process of removing from office, by impeachment, pursuant to Article 145 and 150

of the Constitution, Respondent Nos 3 and 76.

11. Directs the Registrar of the High Court to report this Honourable Court's findings to the Attorney General, pursuant to section 38 of the Public Officer Ethics Act, 2003, that recovery measures of public property, services and benefits unlawfully enjoyed by errant Respondent Nos 1 to 29, 31 to 69 and 76 to 80 and consequential by – election costs be recovered from those of the same affected by parliamentary and presidential by-elections, pursuant to section 2, 45 and 51 of the Anti corruption and Economic Crimes Act, 2003.

12. Directs the Registrar of High Court to report this Honourable Court's findings to the Director of Public Prosecutions, pursuant to section 38 of the Public Officer Ethics Act, 2003, that the said office may consider whether or not to commence criminal proceedings against respondent Nos 1 to 80 inclusive.

13. Orders the respondents, as apportioned by this Honourable Court as among them, to pay the petitioner's costs.

4. The Petition is not supported by an affidavit verifying the facts of the petition.

### **THE RESPONSES**

5. The Interested Party on 23<sup>rd</sup> September 2016 filed grounds of opposition. The Interested Party's Grounds of Opposition dated 22<sup>nd</sup> September 2016 were as follows:

1. That the sixth Schedule to the Constitution of Kenya 2010 provides for the provisions that were suspended until the first general elections were held in 2013, under the New Constitution. The Petitioner alleged violation of constitutional provisions that were suspended and thus were not applicable to the Respondents in this matter.

2. That the Petition is contrary to well established principle of law that where a procedure is provided for in law, that procedure ought to be followed. The petitioner has failed to exhaust all the options available to him under the law for redress of this matter before moving this Honourable Court.

3. That sections 7, 8 and 9 of the Fair Administrative Action Act 2015 which the petitioner also seeks to rely on, does not apply in respect of this matter. The Petitioner has mixed up issues of constitutional interpretation under Article 165 of the Constitution and sections 7, 8 and 9 of the Fair administrative Action Act, 2015. The constitutional matters being weighty and substantial matters of constitutional interpretation thus deprives the Petition claim for application of the Fair Administrative Action Act 2015. [sections 7, 8 and 9 of the Act are then set out].

4. That the Petitioner in his Prayers seeks the Court to direct the National Assembly to exercise powers that are not within the Court's jurisdiction as provided for under Article 165 of the Constitution.

5. That the courts cannot interfere with any process being undertaken by other independent organs under the Constitution like Parliament as an arm of government because of the doctrine of separation of powers. The constitutional principle of separation of powers requires that each arm of Government operates independently without undue interference from the other arm of Government.

6. That the intervention of the Court is limited to review of the process employed by the Houses of Parliament and to delve into the substance or merits of any proceedings or report by the Hoses.

7. That the Petitioner ought to have petitioned the National Assembly Committee on Powers and Privileges for investigation and appropriate disciplinary action.

8. That the petition herein lacks merit, it is frivolous, generally argumentative, misconceived, misdirected and vexatious and an outright abuse of the Court process and ought to be dismissed with costs.

6. The 51<sup>st</sup> Respondent filed an appearance on 7<sup>th</sup> December 2016 through M/S Laichena Mugambi & Co. Advocates but did not file any response by way of affidavit or Grounds of opposition.

7. Mr. Ngatia, Advocate attended Court on 20<sup>th</sup> December 2016 for the 78<sup>th</sup> and 175<sup>th</sup> Respondents and indicated that they relied on the pleadings and submissions filed by the Interested Party.

### **SUBMISSIONS**

8. The Interested party filed written submission dated 22<sup>nd</sup> September 2016 through its counsel, Mr. S. M. Mwendwa, Advocate.

9. The Petitioner filed written submissions in reply to the interested party's submissions dated 1<sup>st</sup> October 2016.

10. Despite leave granted, the Interested Party did not file supplementary submissions as intimated on 20<sup>th</sup> December 2016.

11. The matter was set for hearing by way of highlighting of submissions already filed by the parties on 27<sup>th</sup> December 2016, which date was subsequently gazetted as a public holiday and the hearing could not therefore proceed.

12. On 28<sup>th</sup> December 2016, the Petitioner moved the court by certificate of urgency on the ground that in accordance with Article 105 (2) of the Constitution the petition had to be determined before the 7<sup>th</sup> January 2017, six months after its filing on 8<sup>th</sup> July 2016. The Court could not determine, ex parte, whether the petition was so affected and in deference to the petitioner's case fixed the matter for hearing on the 29<sup>th</sup> December at 2.30pm.

13. On the same date the 28<sup>th</sup> December 2016 filed without leave an affidavit in support of the Petition sworn on the same date by the Petitioner. Being so late in the hearing with no opportunity for the respondents and the interested Party to be served with the affidavit for their response before the hearing, the Court declined to the affidavit which must be expunged from the Record.

### ***The Parties' respective cases***

14. The Petitioner's case is that members of the 10<sup>th</sup> Parliament who were appointed state officers as the prime minister, the Deputy Prime Ministers and Nominated Members of the 10<sup>th</sup> Parliament and who remained officials of political parties for various periods between 27 August and the general election of 4<sup>th</sup> March 2013 violated the provisions of Article 77(2) and 75(1) of the Constitution of Kenya, which by virtue of Article 263 of thereof came into force upon promulgation on the 27<sup>th</sup> August 2010, and were therefore liable to be removed from office under the provisions of Article 75(2). Although they were not so removed, they were deemed to have been removed from office under the self-executing provisions of Article 2 (4) of Constitution. The authorities that failed to take action to remove the 'errant' state officers, that is the President, Members of parliament and the Justice and Legal Affairs Committee of the National Assembly - respectively for the Cabinet ministers and their assistants, the Prime Minister and Deputy Prime Ministers and the Nominated Members of Parliament – all contravened the provisions of Article 75(2) of the Constitution and the MPs of were subject to the discipline of Article 99 (2) (h) that they were disqualified from being elected a member of Parliament for breach of chapter six of eh Constitution. As a consequence of contravention of the provisions of Article 77(2) and &5(1) the affected members of the 10<sup>th</sup> Parliament are disqualified from holding any other state office including their elected

positions in the 11<sup>th</sup> Parliament. Other consequences of the breach were that the current President and his deputy who were members of the 10<sup>th</sup> Parliament holding state offices as members of the Cabinet are subject to removal by impeachment by Parliament and all the 80 errant state officers of the 10<sup>th</sup> parliament committed economic crimes under the Anti-corruption and Economic Crimes by receiving public property, service or benefit after the date when they should have been removed from office by reason of contravention of eh Article 77(2) and 75(1) of the Constitution and thereby liable to criminal prosecution under section 45 of the Act and to pay compensation under section 51 of the Act.

15. The Interested Party's case upon which its opposition to the Petition is founded is principally four-fold as set out in the written submissions dated 22<sup>nd</sup> September 2016 as follows:

1.The Provisions of Constitution of Kenya 2010 to the members of Parliament and Executive elected under the former Constitution by virtue of the suspension of the provisions of chapter Seven, Eight and Articles 129 – 155 of the Constitution of Kenya 2010 by Article 2 of the Sixth schedule of the Constitution on Transitional and Consequential Provisions.

2. The process for removal or disqualification of any state officer is provided for in Articles 99, 103,144, 145, 152(5), 181 of the Constitution among others depending on the office holder; and other processes provided for in various statutes, and for any state officer who has contravened the principles of Chapter Six or any Code of Conduct and Ethics, the procedure is equally provided for in various provisions of the Constitution and statutes, and which should be strictly followed.

3. The intervention by the Court is limited to review of the process employed by the Houses of Parliament and not to delve into the substance or merits of any proceedings or report of the Houses. The Constitutional principle of separation of powers requires that each arm of the Government operates independently without undue interference from the other arms of Government.

4. The Petitioners prayers are unclear since the petitioner has not laid out any factual basis to support the claims and has combined constitutional, civil and criminal allegations making the petition incomprehensible misconceived, misdirected, vexatious, frivolous and difficult for the Interested Party to respond appropriately.

16. The 78<sup>th</sup> and 155<sup>th</sup> Respondents are bound by the submissions of the Interested Party.

### **ISSUES FOR DETERMINATION**

17. The issues raised in the Petition are as follows:

a. Whether the Petition is competently before the court and whether the court has jurisdiction over the matter raised in the petition,

b. Whether the court may grant the reliefs sought by way of directions to parliament and other relevant constitutional bodies.

18. A peripheral Issue as to whether the Petition before Court was a petition within the meaning of Article 105 (2) of the Constitution and governed by the time line for disposal of six months from the date of filing may be determined quickly. Section 105 of the Constitution provides as follows:

*“105. (1) The High Court shall hear and determine any question whether—*

*(a) a person has been validly elected as a member of Parliament; or*

*(b) the seat of a member has become vacant.*

**(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.**

**(3) Parliament shall enact legislation to give full effect to this Article.”**

19. In accordance with this constitutional mandate under Article 105(3), Parliament enacted the Elections Act 2012 to give effect to the Article 105. The Elections Act provides in relevant part as follows:

**“76. Presentation of petitions**

**(1) A petition—**

*(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation;*

*(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or*

**(c) to seek a declaration that a seat in Parliament has become vacant may be presented at any time.**

*(2) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.*

*(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.*

*(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.*

*(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplemental petition.”*

20. The Petition before the court seeks among other relief a principal order of declaration that the seat in Parliament held by the persons who are alleged to have contravened article 77(2) and 75(1) of the Constitution have become vacant, and such petition could be filed at any time not necessary upon an election. When such an Article section 72(1) (c) petition is filed, the timelines set by the Constitution in Article 105(2) apply to set an outer limit of disposal at six months from the date of filing. This position is reiterated by section 85 of the Elections Act as follows:

**“85. Determination of election petition**

*An election petition under this Act shall be heard and determined within the period specified in the Constitution”*

21. The Court was not moved to halt the proceedings for want of deposit of security of costs in terms of

section 78 of the Elections Act, but I consider that the provision may unconstitutionally infringe upon the petitioners right to access to justice under Article 48 of the Constitution for the enforcement of the rule of law, in view of the large number of respondents. Section 78 provides as follows:

**“78. Security for costs**

**(1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.**

(2) A person who presents a petition to challenge an election shall deposit—

(a) one million shillings, in the case of a petition against a presidential candidate;

**(b) five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor; or**

(c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.

**(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent’s costs.**

(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.

(5) An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security.”

22. I think that the petition may proceed to hearing the want of security deposit notwithstanding.

**DETERMINATION**

**Whether the Petition is competently before the court**

23. The petition may not fail for mixing claims for the enforcement of Articles of the Constitution and appeal from decision of the Interested Party under section 7, 8 and 9 of the Fair Administrative Action Act 2015. Article 159 of the Constitution demands substantial justice. What is required is sufficient particularity of the claim to enable the respondent to plead to the claim and the Court to appreciate the nature of dispute it is called upon to adjudicate. See *Anerita Karimi Njeru v. Attorney General* (approved in *Mumo Matemu v. Trusted Society of Human Rights Alliance* Civil Appeal No. 290 of 2012 [2013] eKLR).

24. Although the Petition herein may be woven into a mixture of claims, sub-claims and consequential reliefs, the matter is reasoned in a chronology of argument leading to each of the prayers of the Petition, and I do not find that its resulting complexity is a breach of the particularity principle of the *Anerita Karimi decision*.

25. The Petition, however, fails in presenting the evidence to verify the allegations of fact pleaded in the Petition. Any finding as sought that the named respondents were in contravention of the Constitutional provisions of Article 77(2) and 75(1) by reason of holding contemporaneously offices in political parties and in State Office, must depend on proof that they so held the two offices at the same time. Without such evidence, the Court cannot make declarations akin to those made in *Abdulrahman Ahmed Abdalla & 3 Ors. v. Uhuru Kenyatta and Anor.*, Mombasa Petition No. 17 of 2010 [2012] eKLR and *Isaac Aluoch Polo Aluochier v. Uhuru Kenyatta and Anor.*, Nairobi Petition No. 360 of 2013, that the

respondents therein had contravened article 77(2) of the Constitution.

26. As I held in Petition No. 297 of 2016 *Isaac Aluoch Polo Aluochier v. The National Alliance and 542 Others* in this regard –

***“11. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act, which provide as follows:***

**“107. Burden of proof**

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

**108. Incidence of burden**

*The burden of proof in a suit or proceeding lies on **that person who would fail if no evidence at all were given on either side.***

**109. Proof of particular fact**

*The **burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,** unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

*12. The liability of the respondents, which is sought by the Petitioner herein depends on the proof of the facts that the respondents breached the Constitution and statute as pleaded on the Petition. The petitioner, therefore, has the general burden of proof (ss. 107 and 108 of the Evidence Act) and of the particular facts (s. 109 of the Evidence Act) of the respondents’ positions as **state officers and party officials** and of their **nominations** in breach of the law. **There was no evidence that the named respondents alleged to have been state officers were also officials of political parties while they held those state offices.***

*13. While the Court may, under section 60 (1) (f) of the Evidence Act, take judicial notice of the cabinet positions of the some of the respondents which are gazetted in the Kenya Gazette, it is not so with the Party positions they are alleged to have held at the time of the nominations for the 2013 elections. **The officials of political parties are matters of fact the particulars of which are registered with the Registrar of Political Parties, but which must be proved before the Court.**”*

27. That is the same situation in this petition and the Court cannot make any declarations of contravention of Articles 77(2) and 75(1) of the Constitution. The Table at paragraph 22 of the Petition does not offer proof of holding of party position other than a bare assertion of such holding in named party, party office and alleged date of removal respectively in respectively the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> columns of the Table.

28. I do not accept the submission by the petitioner that the matters of fact in the petition are matters of public notoriety which may be judicially noticed. The holding of a position in a political party is proved by notoriety but by proof of the legal appointment or election as such an official of a political party. In addition whether proceedings for the discipline of a state officer have been held by Parliament is a matter of proof as judicial notice under section 60 (1) (b) of the Evidence Act may only be taken of “the general course of proceedings and privileges of Parliament, but not the transactions in their journals.”

**Whether the court has jurisdiction over the matter raised in the petition**

## ***Declaration of breach of Constitution***

29. The Court has jurisdiction to interpret the constitution under Article 165(3) (d) of the Constitution. Similarly the Court has jurisdiction to supervise persons and bodies exercising judicial and quasi-judicial authority under Article 165(6) and (7) of the Constitution. Is there a breach of the Constitution?

30. Certain provision of the new Constitution of Kenya 2010 were suspended as shown in clause 2 of the Schedule Six of the Constitution of Kenya 2010 on **TRANSITIONAL AND CONSEQUENTIAL PROVISIONS**, as follows:

*“2. (1) The following provisions of this Constitution are suspended until the final announcement of all the results of the first elections for Parliament under this Constitution—*

*(a) **Chapter Seven**, except that the provisions of the Chapter shall apply to the first general elections under this Constitution.*

*(b) **Chapter Eight**, except that the provisions of the Chapter relating to the election of the National Assembly and the Senate shall apply to the first general elections under this Constitution; and*

*(c) **Articles 129 to 155 of Chapter Nine**, except that the provisions of the Chapter relating to the election of the President shall apply to the first general elections under this Constitution.*

*(2) The provisions of this Constitution relating to devolved government, including Article 187, are suspended until the date of the first elections for county assemblies and governors held under this Constitution.*

*(3) Despite subsection (2)—*

*(a) elections for county assemblies and governors shall be held in accordance with Articles 177 and 180 of this Constitution; and*

*(b) the laws relating to devolved government, required by this Schedule and Chapters Eleven and Twelve of this Constitution, shall be enacted within the period stipulated in the Fifth Schedule.*

*(4) Article 62 (2) and (3) is suspended until the National Land Commission is established.”*

31. The provisions of the Constitution that were suspended under clause 2 of the Transitional and Consequential Provisions relate to chapter 7 on representation of the People with parts on electoral system and process, the independent Electoral and Boundaries Commission and delimitation of electoral units, political parties; Chapter 8 on the Legislature with parts on Establishment and Role of Parliament, composition and membership of Parliament, Offices of Parliament, Procedure of enacting legislation, Parliament’s general procedures and rules and Miscellaneous; and chapter Nine on the Executive with parts on principles and structure of the national executive, the President and Deputy President, the Cabinet, and other offices.

32. I am aware of the of the decisions of the High Court in *Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta & Another* [2016] eKLR and in *Abdulrahman Ahmed Abdalla & 3 Ors. v. Uhuru Kenyatta & Anor.* [2012] eKLR (a three Judge-bench in which I sat) which declared the respondent state officers therein as having contravened Article 77(2) of the Constitution. However, having now had the benefit of submission on this matter and having reconsidered the issue of the application chapter six of the Constitution of Kenya 2010, I am persuaded and do find that Article 77(2) of the Constitution did not apply to the Executive and the Legislature under the 10<sup>th</sup> Parliament before first general election under the Constitution of Kenya 2010. This must be the reason why Clause 3 of the Transitional and Consequential Provisions saved certain provisions of the former constitution in clear terms, as follows:

*“3. (1) Until Parliament passes the Act anticipated in Articles 15 and 18, **section 93** of the former*

Constitution continues to apply.

(2) Sections 30 to 40, 43 to 46 and 48 to 58 of the former Constitution, **the provisions of the former Constitution concerning the executive, and the National Accord and Reconciliation Act, shall continue to operate until the first general elections held under this Constitution,** but the provisions of this Constitution concerning the system of elections, eligibility for election and the electoral process shall apply to that election.

(3) Until the National Police Service Commission mentioned in Article 246 is established, section 108(2) of the former Constitution applies to appointments, discipline and the removal of persons from office in the National Police Service.”

33. In these circumstances the law for the discipline of the members of the Executive and the legislature would be under the former constitution, and not the Constitution of Kenya 2010 which had suspended the provisions on Executive and the Legislature and directed that the provisions of the former constitution do continue to operate. For instance, a member of Parliament could be disqualified under section 35 of the former Constitution as follows:

“35. Disqualifications for election.

(1) Subject to any order made under subsection (6), a person shall not be qualified to be elected as an elected member if, at the date of his nomination for election, he—[FN: 5 of 1979, s. 2.]

(a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign state; or

(b) is under sentence of death imposed on him by a court in Kenya, or is under sentence of imprisonment (by whatever name called) exceeding six months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court; or

(c) is, under any law in force in Kenya, adjudged to be of unsound mind; or

(d) is an undischarged bankrupt, having been adjudged bankrupt under any law in force in Kenya; or

(e) subject to such exceptions and limitations as may be prescribed by Parliament, has an interest in a class or description of contract made with the Government of Kenya as may be prescribed by Parliament; or

(f) holds or is acting in any office in the public service (including the office of judge or member of a court of law or an office to which section 69 applies), in the armed forces of the Republic or in a local government authority.

(2) For the purpose of subsection (1) (b)—

(a) two or more sentences of imprisonment that are required to be served consecutively shall be regarded as separate sentences if none of those sentences exceeds six months, and if any one of those sentences exceeds that term they shall be regarded as one sentence; and

(b) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

**(3) Parliament may provide that a person who, at the date of his nomination for election, holds or is acting in an office that is prescribed by Parliament and the functions of which involve responsibility for or in connexion with the conduct of an election to the National Assembly or the compilation of a register of voters for the purpose of such an election shall not be qualified**

**to be elected as a member of the National Assembly.**

(4) Parliament may provide that a person who is convicted by a court of an offence that is prescribed by Parliament and that is connected with the election of members of the National Assembly or of a local government authority, or who is reported guilty of such an offence by the court trying an election petition, shall not be qualified to be nominated for election as a member of the National Assembly for such period (not exceeding five years) following his conviction or, as the case may be, following the report of the court as may be so prescribed.

(5) Parliament may provide that a particular office shall be deemed to be or not to be an office for the purposes of subsection (1) (f).

(6) The Minister for the time being responsible for elections to the National Assembly may, by order published in the Kenya Gazette, provide that a person shall not be qualified to be elected by virtue of holding an office specified in paragraph (f) of subsection (1), or specified for the purposes of that paragraph under subsection (5), which is prescribed in the order, if he holds that office after a date prescribed in the order, which date shall not be more than six months prior to the date of nomination for preliminary elections prescribed under an Act of Parliament:

*Provided that no order under this subsection shall be made to operate with retrospective effect.”*

34. In addition Clause 12 of the Transitional and Consequential Provisions of the C Constitution of Kenya 2010 provides:

***“12. (1) The persons occupying the offices of President and Prime Minister immediately before the effective date shall continue to serve as President and Prime Minister respectively, in accordance with the former Constitution and the National Accord and Reconciliation Act, 2008 until the first general elections held under this Constitution, unless they vacate office in terms of the former Constitution and the Accord.***

***(2) The persons occupying the offices of Vice-President and Deputy Prime Minister or holding a position in the Cabinet or as an Assistant Minister immediately before the effective date shall continue to serve in accordance with the former Constitution until the first general elections held under this Constitution unless they vacate or are removed from office in accordance with the former Constitution and the National Accord and Reconciliation Act.***

***(3) A person who was elected President before the effective date is not eligible to stand for election as President under this Constitution.”***

35. These provisions of the Transitional and Consequential Provision of the Constitution of Kenya 2010 indicate the intention of the people of Kenya that the affairs of the Executive and Legislative arms of the Government be governed by the saved provisions of the former constitution.

***Removal of Respondent state officers from office***

36. Even if the article 77 (2) provisions were held to apply to the executive and legislature before the first general election, the Court does not have concurrent jurisdiction with the responsible bodies for the removal of the persons the subject of the petition. It is the bodies charged with disciplinary authority over the state officers, and not the courts, who would subject them to disciplinary proceedings and **may** in accordance with that procedure dismiss or remove them from office.

37. The relevant parts of Articles 75 and 77 of the Constitution provide as follows:

***75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—***

- (a) any conflict between personal interests and public or official duties;
- (b) compromising any public or official interest in favour of a personal interest; or
- (c) demeaning the office the officer holds.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)—

- (a) **shall be subject to the applicable disciplinary procedure for the relevant office; and**
- (b) **may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.**

**(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions mentioned in clause (2) is disqualified from holding any other State office.**

**77. (2) Any appointed State officer shall not hold office in a political party.**

38. I accept the submission by the Interested Party in urging deference to the constitutional bodies charged with function of the removal of state officers in reliance of the Court of Appeal decision in **Mumo Matemu v. Trusted Society of Human rights Alliance & 5 Ors.** [2013] eKLR as follows:

*“(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the petition the subject of this appeal that:*

***“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...”***

39. I also agree that the Court would be expanding its jurisdiction by the judicial craft abhorred by the Supreme Court in **Samuel Kamau Macharia v. Kenya Commercial Bank & 2 Ors.** [2012] eKLR as follows:

***“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal***

*by statute law.”*

40. The jurisdiction to remove of the State officers for their alleged contravention of the Constitution must remain within the constitutional bodies appointed by the Constitution for that purpose and the High Court cannot expand its Article 165 jurisdiction to include power to remove such officers from office. Akin to this principle of constitutional limit of jurisdiction is the mirror principle that where the constitution provides for a procedure for redress of a particular grievance the procedure should be strictly followed: see ***The Speaker of National Assembly v. Karume***, [2008] 2 KLR (EP) 423, where the Court of Appeal held –

*“In our view there is considerable merit in the submission that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed.”*

### **Removal by operation of the law**

41. Article 2 (4) of the Constitution provides as follows:

*“2. (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and **any act or omission** in contravention of this Constitution is invalid.”*

42. With respect, the Article 2 (4) cannot be construed in my view as to give jurisdiction to this Court to declare the respondents removed from office by reason of their alleged default in neglecting to carry out their constitutional duties, which depend on the action of a person moving the organ or body authorized by the Constitution to make a determination as to the removal of the respondents. To impose such a duty on each and every person who could move the authority is unreasonably infringe on the basic liberty rights of the person including the freedom of conscience.

43. The process of removal of state officers has inbuilt procedures for fair hearing and their removal by the court without the due process under the constitution is itself unconstitutional. Indeed, removal from office is not automatic upon allegations or finding of contravention of the constitution. The Constitution anticipates that a state officer may be removed in accordance with relevant disciplinary procedures for breach of the provisions of Article 75 (1) and 77 of the Constitution. In its use of the word “may” the Constitution anticipates that extenuating circumstances may militate against removal, and hence discretion is given to the disciplinary body. The Court cannot usurp the duty of the disciplinary body.

44. In similar terms the learned Judge in ***Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta & Another*** [2016] eKLR found that it is Parliament that has the duty to remove the President and Deputy President from office, that failure on the part of the disciplinary body does not lead to automatic removal by operation of the law and held as follows:

*78. “The import of all the above provisions is that any person who violates **Article 77 (2) of the Constitution** must be subject to the applicable disciplinary procedure for the relevant office; and **may**, following that disciplinary procedure be dismissed or otherwise removed from office. In the event that the person is dismissed or otherwise removed from office, he/she would be disqualified from holding any other State office.*

*79. Applying the above provisions to the facts before me, I resolve that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents **should at the time** they violated **Article 77 (2) of the Constitution** have been subjected to the relevant disciplinary procedures for the offices they were holding. This **may** have led to their dismissal or removal from office, which would have disqualified them from holding any other State office.*

*80. But none of the above happened. Despite **Article 259 (8)** that provides for the undertaking of actions without unreasonable delay as soon as the occasion arises, the fact remains that the*

disciplinary actions that may have led to the Respondents' dismissal or removal from office were not undertaken, and have now been delayed for at least three years and have been followed by several other actions such as the Respondents assuming other State offices.

81. In accordance with **Article 2(4)** of the **Constitution**, which invalidates any act or omission in contravention of the **Constitution**, the fact that the Respondents did not undergo any disciplinary procedures is indeed not a valid action.

82. The significance of the above findings is that such disciplinary procedure should have been carried out at the relevant time and this Court agrees with the Petitioner's argument to that extent only. This Court is in divergence however and finds that adverse consequences of a disciplinary action that **should have** taken place should not in this instance be visited upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

83. The Constitution uses the word "may" in reference to the outcomes of the disciplinary actions and only specifies removal from office and dismissal as possible sanctions resulting from the disciplinary actions; there is therefore a possibility that these disciplinary actions may lead to sanctions other than dismissal or removal from office. Apposite interpretation of this Article of the Constitution would then be, that in the case that disciplinary actions do not lead to removal from office or dismissal (or lead to other sanctions than removal from office or dismissal), then the persons who are subject to these disciplinary actions would not be disqualified from holding any other State office.

84. As the results of the disciplinary actions may vary, this Court would be remiss in imagining that disciplinary action against the Respondents took place and in doing so assuming the worst result thereof - the removal or dismissal from office of the Respondents - which would have the weightiest consequences on them, i.e. disqualification from holding any other State office. In any case, this Court is not the institution mandated to undertake the disciplinary actions in question. Such assumptions by the Court would unprocedurally limit the rights to fair administrative action and political rights to take up elective and other State offices as established by the Constitution.

85. Therefore, even having found in the positive for a violation of **Article 77 (2)**, this Court cannot decorously declare that notwithstanding that the Respondents were not dismissed from appointive State offices, they stood dismissed or otherwise removed from the said appointive offices by operation of the law.

86. Having found that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot be said to have been dismissed or otherwise removed from office, I cannot also find that they are disqualified from holding other State office. I certainly cannot find that they would be disqualified from holding the offices of President and Deputy President precisely because, as I conferred earlier in this judgment, this subject falls under the exclusive jurisdiction of the Supreme Court. As a consequence, I cannot proceed to order, as prayed for by the Petitioner, that the Respondents ought to cease holding the offices of President and Deputy President with immediate effect for the reason that they are not qualified to so hold these or any other State offices.

87. On the foregoing, I also specify that the procedure of removal of a President and Deputy President from office, as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been in office for a significant period of time, cannot be undertaken by this or other Court as it is clearly provided for in the Constitution under **Articles 144, 145** and **Article 150 (2)** which state thus:

**"(1) A member of the National Assembly, supported by at least a quarter of all the members, may move a motion for the investigation of the President's physical or mental capacity to perform the functions of office.**

**(3) Within seven days after receiving notice of the resolution from the Speaker, the Chief Justice shall appoint a tribunal...**

**(6) The tribunal shall inquire into the matter and, within fourteen days after the appointment, report to the Chief Justice and to the Speaker of the National Assembly.**

...

**(9) If the tribunal reports that the President is incapable of performing the functions of the office, the National Assembly shall vote on whether to ratify the report.**

**(10) If a majority of all the members of the National Assembly vote in favour of ratifying the report, the President shall cease to hold office.”**

**“Article 145(1) states: A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President—**

...

**(2) If a motion under clause (1) is supported by at least two-thirds of all the members of the National Assembly—**

**(a) the Speaker shall inform the Speaker of the Senate of that resolution within two days;**

...

**6(b) ... the Senate shall, after according the President an opportunity to be heard, vote on the impeachment charges.**

**(7) If at least two-thirds of all the members of the Senate vote to uphold any impeachment charge, the President shall cease to hold office.”**

and

**“(2) The provisions of Articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.”**

88. Prior to their taking office any challenge to the nomination and election of the President and Deputy President should have been, as discussed previously, brought before the IEBC in accordance with **Article 88 (4)(e) of the Constitution** and as appropriate, before the Supreme Court in accordance with and within the timeline specified in **Article 140 of the Constitution.**”

45. The issue whether this court can by operation of the law determine pursuant to Article 2(4) of the Constitution that the respondents are deemed to have been removed from office is clearly barred by res judicata. Sections 7 and 8 of the Civil Procedure Act provides for the principle and effect of res judicata as follows:

#### **“7. Res judicata**

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

*Explanation.* —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

*Explanation.* —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

*Explanation.* —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

**Explanation.** —(4) **Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

*Explanation.* —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

**Explanation.** —(6) **Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

## **8. Bar to further suit**

*Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”*

46. As the Court in Petition No. 360 of 2013 observed in its Judgment, “The Petitioner herein is a Kenyan citizen who describes himself as a person acting in the public interest”, and the petitioner could and should have joined the other respondents in the previous suit and therefore the decision in previous suit applies to this suit against them together with the two respondents in the previous suit Petition no. 360 of 2013.

47. As regards whether the Court may make declarations amounting to performing duties of other constitutional bodies, I take the view that the Court may not exercise the mandate of the constitutional bodies, make the necessary determinations and then direct the constitutional bodies to effect the determinations. The Court would have in those circumstances exercised pretended powers under a non-existent concurrent jurisdiction. In a previous suit by the Petitioner, ***Issac Aluoch Polo Aluochier v The National Action party and 542 Others***, Petition No. 297 of 2016 by the Petitioner against 542 respondents being registered political parties and their officials on same question of consequences of breach of Article 77(2) and 75 (1) of the Constitution, this Court ruled as follows:

### **“Conclusion**

34. *The petition was two-fold: it sought that the Court makes declarations and related relief or, in the words of the Petitioner “Discovers that”, that the respondents as political parties had violated Article 75 (2) and 77 (2) of the Constitution in allowing and nominating for general elections of 4<sup>th</sup> March 2013 the named respondents who were officials of the said political parties who were public officers within the meaning of the Constitution and therefore prohibited from holding political party offices. The Petitioner also sought relief as consequences and penalties for such violation against the Political Parties and such Party Officials under the Political Parties Act.*

35. *While the High Court has jurisdiction to make declarations in its interpretative role, such determinations must be made on the basis of evidence presented by the Petitioner in support of his case. Unfortunately in this case, the Petition to the Court was not supported by any affidavit on the facts in issue, and the Court was accordingly not able to make the adjudication sought. Whereas the Court could, pursuant to the Article 159 principle of substantial justice readily take judicial notice in accordance with section 60 of the Evidence Act of the gazetted public officer*

positions to which the respondents were appointed, the Court would require evidence of the party positions held by such public officers as evidence of the breach of the constitutional prohibition of Article 77(2) of the Constitution.

**36. In addition, the High Court does not have under its original unlimited jurisdiction an administrative concurrent jurisdiction to impose and execute the penalties that the Registrar is empowered to mete out on erring political parties under the Political Parties Act.** *The executive power to deregister, suspend or issue directions as to the operations of the political parties lies with the Registrar of Political Parties under section 21 and 45 of the Political Parties Act...*”

48. Accordingly, on the principle of res judicata and on the finding that the court cannot usurp the constitutional role of other constitutional bodies, the Court declines jurisdiction in the matters of discipline and removal from office of the respondents and the consequential declarations and action sought by the petitioner.

**Whether the court may grant the reliefs sought by way of directions to parliament and other relevant constitutional bodies**

49. As held by this Court in the petitioner’s suit ***Issac Aluoch Polo Aluochier v. Ahmed Issack Hassan & 14 Others***, Petition No. 301 of 2016, the jurisdiction of the Court over constitutional organs for the performance of their duties is indubitable:

*“34. Articles 1 (3) and 2 (2) of the Constitution of Kenya entrenches Constitutionalism, that is the principle of government limited by law. Constitutionalism supports constitutional democracies such as Kenya where the Constitution and other law provide the basis for all exercise of power. Organs of the State are bound to comply with constitutional and statutory provisions relating to their respective functions. The National Assembly and the Judicial Service Commission have constitutional duties in accordance with Article 251 (3) and 168 (4) of the Constitution, respectively, to consider petitions for the removal of Commissioners and Judges. **While the Court may not direct the constitutional bodies or other bodies exercising judicial or quasi-judicial functions as to how to exercise discretion in the performance of their duties, it may properly within its judicial mandate under Article 165 (6) and (7) of the Constitution and as an imperative of the rule of law, direct that the said bodies do exercise their constitutional mandate in accordance with the Constitution and the law.**”*

50. For the foregoing reasons, there is no occasion for the Court to exercise supervisory jurisdiction over any constitutional organ exercising judicial or quasi-judicial authority.

**CONCLUSION**

51. Having found that the provisions of Article 77(2) does not apply to the executive and the legislature before the first general election under the Constitution of Kenya 2010, the consequential alleged contravention of the Constitution and statute do not arise. I have also found that the issue of self-executing provision of Article 2(4) of the Constitution with the effect of deeming the respondent state officers as removed by operation of the law is res judicata. I also find that to punish all persons who have liberty to move disciplinary proceedings against an alleged errant state officer would contravene their rights to freedom of conscience, and in any event the court has no power to order the removal of the respondent state officers whose discipline must be in accordance with procedures set out in the Constitution and the law.

52. I must observe that the petitioner has in all three petitions before this court – Petition Nos. 292, 297 and 301 of 2016 and in Petition No. 360 of 2013 raised the same question of breach of Article 77(2) and 75(1) of the Constitution by the various respondents who served as state officers and officials of political parties for varied durations between the period of the commencement of the new Constitution on 27<sup>th</sup> August 2010 and the first general elections under the new Constitution. The suits only varied with regard to the respondents and consequences of the breach and reliefs sought against the alleged ‘errant state

officers', their political parties, the Independent Elections and Boundaries Commissioners and Judges of the Supreme Court, the persons and bodies exercising disciplinary authority over the said errant officers and other enforcement agencies.

53. I consider that all these matters could have been litigated in one petition before the Court as they flow from the same transaction, which is the alleged contravention by the named appointed state officers of the Articles 77(2) and 75 (1) of the Constitution. In this regard, I must reiterate the reprimand by Lenaola, J. (as he then was) in Petition no. 360 of 2013 as follows –

**“Conclusion**

*90. I note, as was stated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Petitioner indeed brought other matters before the Supreme Court and the IEBC for consideration and determination, which matters contained some of the issues raised in this Petition and were duly disposed of by these institutions. The Petitioner also mentions in his Petition that the present matter has been brought before this Court in the public interest to facilitate constitutional compliance in public service.*

*91. This Court recognises the importance of and upholds the right to be heard but cautions against bringing matters, that seek to outwit other legal institutions; and matters which seeking remedies beyond public interest remedies, are not in the public interest although disguised as such. **This Court can serve neither as an avenue to reconsider decisions that have been meted out by higher Courts nor as a forum to circumvent procedures that are clearly set out in the law.”***

**ORDERS**

54. For the reasons set out above, the Petition is declined.

55. Each Party will bear its own Costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF JANUARY 2017.**

.....

**JUDGE**

**Appearances:**

Mr. Isaac Aluoch Polol Aluochier Petitioner

M/S Laichena Mugambi & Co for 51<sup>st</sup> Respondent

Mr. Ngatia for 78<sup>th</sup> and 175<sup>th</sup> Respondents

Mr. S. M. Mwendwa Advocate for the Interested Party